Where a law apparently impairing the obligation of a contract has been upheld under the police power, the contract alleged to have been impaired seems to have been either that of a state purporting to bargain away part of the sovereign power,[40] or that of a public utility, in derogation of its common law duty to render a reasonable service to all.[41] It is well settled that a state has no power to bargain away its sovereignty, and any attempt to do so will be void.[42] Similarly a special contract of a public utility made in derogation of its fundamental legal duty to render a reasonable service at reasonable rates is invalid or at least voidable.[43] Where, however, the contract in question is an ordinary private contract, valid when made, it would seem to be going counter to the plain words of the Constitution to hold that a state, even in the exercise of the police power, could impair it.

It may be true that a general law which incidentally impairs the obligation of private contracts is not invalid for that reason;[44] otherwise it would be possible for private individuals to tie the hands of the government by contracting among themselves. But legislation enacted for the purpose of impairing contract obligations stands on a very different footing. Unless the contract clause of the Constitution is to be swallowed up in the capacious and ever-expanding maw of the police power, such legislation cannot be upheld. It is submitted that the distinction to be drawn is between an incidental impairment through the operation of a general law valid under the police power, and a direct attack on the contract itself. Tested by this criterion, the New York housing laws, so far as they operate to deprive landlords of all power to enforce covenants to quit in leases made prior to the enactment of the laws, are unconstitutional.

EFFECT OF COVENANT OF WARRANTY UPON THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS BY MERGER. — The ease with which contingent remainders could be destroyed at common law, and the grantor's intent thereby defeated, has led England and many states in this country

authorized the defendant to build a dam across the creek to drain certain swampy lands, requiring that he pay compensation to anyone injured by the building of the dam. Plaintiff sought an injunction against the building of the dam. *Held*, that the injunction be denied. It will be noted that the dam was to be built for a public purpose and that the act authorizing it required the payment of compensation for all damages resulting from its construction. The case seems to have been in substance one of the exercise of the power of eminent domain to extinguish the plaintiff's contract right. That this may be done is clear. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507 (1848).

[40] *Cf.* Stone *v.* Mississippi, 101 U. S. 814 (1880); Douglas *v.* Kentucky, 168 U. S. 488 (1897); Atlantic Transportation Co. *v.* Goldsboro, *supra*.

[41] *Cf.* Chicago Ry. *v.* Nebraska, 170 U. S. 57 (1898); Lousiville Ry. *v.* Mottley, 219 U. S. 467 (1910); Texas Ry. *v.* Miller, 221 U. S. 408 (1911); Union Dry Goods Co. *v.* Georgia Public Service Co., 248 U. S. 372 (1919); Producers' Transportation Co. *v.* Railroad Commission, 251 U. S. 228 (1920).

[42] See Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 629 (1819); Boyd *v.* Alabama, 94 U. S. 645, 650 (1876); Stone *v.* Mississippi, *supra*, 817.

[43] See 32 HARV. L. REV. 74; 33 *id.*, 97.

[44] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 833. See also Beer Co. *v.* Massachusetts, 97 U. S. 25, 32 (1877); Manigault *v.* Springs, *supra*, 480.

to enact statutes[1] preventing their destruction. Illinois has no such statute, but in a recent case[2] the Illinois Supreme Court supplies the deficiency in an interesting manner. The facts, somewhat simplified, may be stated thus: A, by warranty deed, created a life estate in B, contingent remainder in fee in B's descendants who should survive him, reversion in fee in A. B's estate was purchased by X on execution sale, and A's estate was similarly purchased by Y. Y conveyed the reversion to X, the expressed intention[3] of both parties being that the life estate should merge in the reversion, and the contingent remainder be destroyed. The court held that, in view of the covenant of warranty in the original deed, the contingent remainder was not destroyed.

At common law the termination of the particular estate on which a contingent remainder depended, before the happening of the contingency, destroyed the remainder. Thus, one means of defeating such remainders was by merger of the particular estate in the next succeeding vested estate. This destroyed the former, and with it the contingent remainder.[4] The result has been reached by the Illinois court in many cases.[5] The only element in the principal case to distinguish it from this line of decisions is the covenant of warranty.[6] Is this enough to take the case out of the general rule?

The meaning and effect of a covenant of warranty, as applied to vested estates, are pretty well defined. Such a covenant in Illinois is practically equivalent to a covenant for quiet enjoyment.[7] It is an engagement that the covenantee's possession shall not be disturbed by one with a paramount title, that the covenantor and his heirs shall not claim the estate, and that the covenantor shall not interfere with the covenantee's possession and enjoyment.[8] If the covenantor has not title to

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[1] See Real Property Act, 8 & 9 VICT., c. 106, § 8; Contingent Remainders Act, 40 & 41 VICT., c. 33. For a list of statutory provisions in the United States, see 2 WASHBURN, REAL PROPERTY, 6 ed., note, 554–7. See also KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2 ed., § 106.

[2] Biwer *v.* Martin, 128 N. E. (Ill.) 518 (1920). See RECENT CASES, p. 435, *infra*.

[3] Therefore the rule of some jurisdictions, that intent to prevent merger will do so, does not apply. McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978 (1906); See 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 788. See *contra*, 3 PRESTON, CONVEYANCING, 3 ed., 43 *et seq.*

[4] Purefoy *v.* Rogers, 2 Saund. 380 (1671); see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 340. There are two exceptions to this rule: where both estates are limited in the same instrument, see Purefoy *v.* Rogers, *supra*, 387 a; see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 345–6; and where the devisee of the particular estate takes the reversion as heir at the same time, see Gray *v.* Shinn, 293 Ill. 573, 127 N. E. 755 (1920); see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 343–4. In these cases the vested estates will open up and let in the contingent remainder when it vests. The reason for the exceptions is that otherwise the contingent remainders would never come into existence at all; and the courts refuse to ignore the creator's intent to this extent. But if the tenant of the vested estates transfers both to a third person, the remainder will be destroyed. Bennett *v.* Morris, 5 Rawle (Pa.) 9 (1835); Messer *v.* Baldwin, 262 Ill. 48, 104 N. E. 195 (1914).

[5] Bond *v.* Moore, 236 Ill. 576, 86 N. E. 386 (1908); Lewin *v.* Bell, 285 Ill. 227, 120 N. E. 633 (1918).

[6] We may assume for purposes of argument the right of the contingent remainderman to avail himself of the covenant.

[7] Bostwick *v.* Williams, 36 Ill. 65 (1864); Caldwell *v.* Kirkpatrick, 6 Ala. 60 (1844).

[8] For a full discussion of the effect of a covenant of warranty see RAWLE, COVENANTS FOR TITLE, 5 ed., c. 8. See also King *v.* Kilbride, 58 Conn. 109, 116, 19 Atl. 519,

the land at the time of the conveyance and covenant, he and those holding under him are estopped to set up any after-acquired title against the covenantee, and such title passes to the covenantee by operation of law.[9]

No case has been found of a contingent remainderman attempting to avail himself of a covenant for title in the deed creating his interest.[10] Assuming that the contingent remainderman can take advantage of the covenant, there seems to be no reason for holding that the covenant means more than that the covenantee shall be protected in the enjoyment of his contingent remainder with all its legal attributes; there is no reason for saying that the covenant gives to the remainder an attribute of indestructibility which it does not ordinarily possess. The grantor has not covenanted that the grantees of vested estates shall not combine them so as to destroy the contingent remainder by merger. He has not covenanted for the continuance of the contingent remainder beyond its natural life.

The result reached by the court in the principal case is not wholly indefensible. There are cases in which merger does not destroy contingent remainders because to do so would render the intent of the creator wholly void.[11] Since destruction is not the invariable consequence of merger, it is understandable that the court should seek so to interpret the covenant of warranty as to estop the creator's grantees to assert that the remainder is destroyed. But, though understandable, the result seems wrong. The end is desirable, but the way to it is through legislation.

RECENT CASES

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — AGENT NOT LIABLE FOR NEGLIGENCE IN FORMATION OF CONTRACT WHERE CONTRACT IS ILLEGAL. — The defendant, as agent of the plaintiff, took out, in accordance with the principal's instructions, an insurance policy which was of a type declared illegal by statute. When a loss occurred, the insurance company refused to pay, on the sole ground that the defendant had not fully disclosed the risk — the insurance company expressly asserting that they would have paid but for this nondisclosure despite the illegality. The defendant is now sued for breach of duty in not disclosing the risk; his defense is that the policy itself is illegal. *Held*, that the plaintiff cannot recover. *Cheshire and Co.* v. *Vaughan Bros. and Co.*, [1920] 3 K. B. 240.

It has been held that a principal has no remedy against his agent for failure to enter into a void contract. *Cohen* v. *Kittell*, 22 Q. B. D. 680. See STORY,

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520 (1889); Beebe *v.* Swartout, 8 Ill. 162, 179–184 (1846); Levitzky *v.* Canning, 33 Cal. 299 (1867).

[9] Kimball *v.* Schoff, 40 N. H. 190 (1860); White *v.* Patten, 24 Pick. (Mass.) 324 (1837); see RAWLE, COVENANTS FOR TITLE, 5 ed., § 248. Though a grantor conveys an estate by deed with covenant of warranty, he may nevertheless disseise his grantee and acquire a valid title by adverse possession. Stearns *v.* Hendersass, 9 Cush. (Mass.) 497 (1852).

[10] The indestructibility of contingent remainders has long been felt desirable. It has been accomplished in the past by trusts to preserve contingent remainders. Smith d. Dormer *v.* Packhurst, 3 Atk. 135 (1742); see WILLIAMS, REAL PROPERTY, 22 ed., 378–9. That no report has been found of any use of the simple method of this case, argues against its validity.

[11] See note 4, *supra*.